(2)

92-1040

Supreme Court, U.S.
FILED
NOV 30 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1992

James Barber, et al.
Petitioners,

v.

Michael Horsey,
individually, et al.
Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX

Robert J. Mulligan Esq.
Attorney for Petitioners
James Barber et al.
Appellants
Attorney I.D. No. 18470
Robert J. Mulligan Esq. P.C.
4800 Larchwood Avenue
Philadelphia, PA. 19143
(215) 474-0744

DATE: November 30, 1992

APPENDIX TABLE OF CONTENTS

Docket Entries..... 1

Complaint..... 9

Stipulation to Extend Time to Answer Complaint..... 34

Defendant's Horsey et al. Motion to Dismiss 31

Plaintiff's Barber et al. Answer to Motion to Dismiss..... 36

November 27, 1991 Memorandum Opinion..... 38

November 27, 1991 Order of Judge Newcomer 46

Notice of Appeal..... 47

July 17, 1992 Order of Three Judge Panel Denying Appeal..... 50

July 17, 1992 Memorandum Opinion of Three Judge Panel..... 52

August 8, 1992 Extension Order..... 61

August 31, 1992 Order Denying Motion for Rehearing and for En Banc Consideration.. 63

GENERAL DOCKET FOR
Third Circuit Court of Appeals

Court of Appeals Docket #: 91-2104
Filed: 12/31/91
Nsuit: 3441
Civil Rights: Voting
Barber, et al v. Horsey, et al
Appeal from: Eastern District of Pennsylvania

- -

Lower court information:

District: 0313-2 : 91-04265
Trial Judge: Clarence C. Newcomer,
District Judge
Date Filed: 7/3/91
Date order/judgement: 12/4/91
Date NOA filed: 12/27/91

- -

Fee status: paid
-- -- -- --
Prior cases:
None
Current cases:
None

Docket as of October 22, 1992 1:01 pm
Page 1

Proceedings include all events.
91-2104 Barber et al v. Horsey et al

JAMES BARBER
Appellant
Robert J. Mulligan Jr
215-474-0744
[COR NTC ret]
Robert J. Mulligan Inc P.C.
4800 Larchwood Avenue
Philadelphia PA 19143

FRED BRANDON
Appellant
Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

ALFONZO CAREY
Appellant
Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

BEATRICE DUNSTON
Appellant
Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

TIJUANA KNOX
Appellant
Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

WILLIAM S. MARTIN
Appellant
Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

MICHAEL C. MCCLEARY
Appellant
Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

CHARLES E. MYERS
Appellant
Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

HARRY L. ROBINSON JR.
Appellant
Robert J. Mulligan Jr
(See above)
[COR NTC ret]

DONITA E. ULMER
Appellant — Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

ESSIE M. WILLIAMS
Appellant — Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

ELSIE L. WISE
Appellant — Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

MEE JIN YOUK — Robert J. Mulligan Jr.
Appellant — (See above)
[COR NTC ret]

Docket as of October 22 1992 1:01 pm
Page 2

Proceedings include all events.
91-2104 Barber, et al v. Horsey, et al

v.

MICHAEL HORSEY Appellee	Stephen J. Springer 215-561-4400 [COR NTC ret] LaBrum & Doak 1818 Market Street 29th Floor Philadelphia, PA 19103
ROBERT BRADY, On behalf of Philadelphia Democratic County Executive Committee, an unincorporated association Appellee	Stephen J. Springer (See above) [COR NTC ret]

Proceedings include all events
91-2104 Barbers et at v. Horsey, et at

JAMES BARBER, (9th Div.), FRED BRANDON, (18th Div.), ALFONZO CAREY, (18th Div.) BEATRICE DUNSTON (16th Div.), TIJUANA KNOX, (1st Div.), William S. MARTIN, (9th Div), MICHAEL C. MCCLEARY, (5th Div.), CHARLES E. MYERS, (7th Div.) HARRY L. ROBINSON, JR., (8th Div.) DONITA B. ULMER, (10th Div.), ESSIE M. WILLIAMS, (5th Div.), ELSIE L. WISE, (1st Div.), MEE JIN YOUK, (8th Div.)

v.

MICHAEL HORSEY, ROBERT BRADY, on behalf of PHILADELPHIA DEMOCRATIC COUNTY EXECUTIVE COMMITTEE,
AN UNINCORPORATED ASSOCIATION

JAMES BARBER; FRED BRANDON; ALFONZO CAREY; BEATRICE DUNSTON; TIJUANA KNOX; WILLIAM S. MARTIN; MICHAEL C. MCCLEARY:
CHARLES E. MYERS; HARRY L. ROBINSON, JR , DONITA E. ULMER ESSIE M. WILLIAMS; ELSIE L. WISE; MEE JIN YOUK,

Appellants

Proceedings include all events.
91-2104 Barber, et al v. Horsey, et al

12/31/91	CIVIL CASE DOCKETED. Notice filed by James Barber, Fred Brandon, Alfonzo Carey, Beatrice Dunston, Tijuana Knox, William S. Martin, Michael C. McCleary, Charles E. Myers, Harry L. Robinson, Jr., Donita E. Ulmer, Essie M. Williams, Elsie L. Wise, Mee Jin Youk. (sma)
12/31/91	BRIEFING NOTICE ISSUED. Appellant brief and appendix due 2/10/92 (sma)
12/31/91	TRANSCRIPT PURCHASE ORDER (PART I), no proceedings in District Court. (ghb)
1/13/92	APPEARANCE from Attorney Robert J. Mulligan on behalf of Appellants, filed. (dlr)
1/13/92	DISCLOSURE STATEMENT on behalf of Appellants, filed. (dlr)
1/13/92	INFORMATION STATEMENT on behalf of Appellants, received. (dlr)
1/13/92	FOLLOW UP LETTER to Stephen J. Springer requesting the following documents: **Appearance Form **Disclosure Statement (dlr)
1/17/92	APPEARANCE from Attorney Stephen J. Springer on behalf of Appellees Michael Horsey and Robert Brady, filed. (dlr)

1/17/92	DISCLOSURE STATEMENT on behalf of Appellees Michael Horsey and Robert Brady, filed. (dlr)
1/21/92	CERTIFIED LIST filed. (ghb)
2/10/92	BRIEF on behalf of Appellants, Pages: 23, Copies: 10, Delivered by mail, filed. Certificate of service date 2/10/92. (wab)
2/10/92	APPENDIX on behalf of Appellants Copies: 5 Volumes: 1, Delivered by mail, filed. Certificate of service date 2/10/92. (wab)
3/16/92	BRIEF on behalf of Appellee Michael Horsey, Appellee Robert Brady, Pages: 19, Copies: 10, Delivered by mail, filed. Certificate of Service date 3/16/92. (wab)
4/1/92	CALENDARED for Tuesday, June 23, 1992. (wab)
6/23/92	SUBMITTED 6/23/92 Coram: Hutchinson, Cowen and Alito, Circuit Judges. (agb)
7/17/92	MEMORANDUM OPINION (Hutchinson, Authoring Judge, Cowen and Alito, Circuit Judges), filed. (bj)
7/17/92	JUDGMENT: AFFIRMED. Costs taxed against appellants, filed. (bj)

Proceedings include all events.
91-2104 Barber, et al v. Horsey, et al

8/3/92	MOTION filed by Appellants to extend time to file petition for rehearing en banc to and including 8/14/92. Certificate of Service dated 8/3/92. (bj)
8/4/92	ORDER (Clerk) granting motion to extend time to file petition for rehearing en banc by Appellants, Extension granted to 8/14/92, filed. (bj)
8/14/92	PETITION by Appellants for rehearing in banc. (rec'd in D. C. nightbox on 8-14-92 @ 11.44pm, and rec'd in USCA on 8-17-92) Certificate of service dated 8/14/92, filed.(bj)
8/31/92	ORDER filed (Sloviter, Chief Judge, Stapleton, Yansmann, Greenberg, Hutchinson, Authoring Judge, Scirica, Cowen, Nygaard, Alito and Roth, Circuit Judges) denying petition for in banc rehearing by Appellant James Barber.(bj)
9/8/92	MANDATE ISSUED, filed. (bj)
9/8/92	RECORD released. (bj)

Docket as of October 22, 1992 1:01 pm
Page 6

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER (9th Div.) 802 North 40th Street Philadelphia, PA 19104 and FRED BRANDON (18TH Div.) 1009 North 46th Street Philadelphia, PA 19131 and ALFONZO CAREY (18th Div.) 1020 North 46th Street Philadelphia, PA 19131 and BEATRICE DUNSTON (16TH Div.) 4633 Ogden Street Philadelphia, PA 19139 and TIJUANA KNOX (1st Div.) 4061 Filbert Street Philadelphia, PA 19104 and WILLIAM S. MARTIN (9th Div.) 4002 Reno Street Philadelphia, PA 19104 and MICHAEL C. McCLEARY (5th D.) 4321 Haverford Avenue Philadelphia, PA 19104 and CHARLES E. MYERS (7TH Div.) 667 Holly Mall Philadelphia, PA 19104 and HARRY L. ROBINSON, JR. (8th D) 764 N. 43rd Street Philadelphia, PA 19104 and DONITA B. ULMER (10th Div.) 835 North Brooklyn Street	CIVIL ACTION NO.

Philadelphia, PA 19104 :
and :
ESSIE M. WILLIAMS (5th Div.) :
616 North Brooklyn Street :
Philadelphia, PA. 19104 :
and :
ELSIE L. WISE (1st Div.) :
4061 Filbert Street :
Philadelphia, PA 19104 :
and :
MEE JIN YOUK (8TH Div) :
4248 Lancaster Avenue :
Philadelphia, PA 19104 :
Plaintiffs :
v. :
MICHAEL HORSEY :
612 Cristina Place :
Philadelphia, PA 19139 :
and :
ROBERT BRADY on behalf of :
PHILADELPHIA DEMOCRATIC :
COUNTY EXECUTIVE COMMITTEE, :
AN UNINCORPORATED ASSOCIATION :
1421 Walnut Street :
Philadelphia, PA 19102 :
Defendants :
:
.....:

INTRODUCTION

1. The jurisdiction of this Court is invoked under Section 1 of the 14th Amendment and the First Amendment to the United States Constitution, Title 28 U.S.C. 1331, federal question under the Federal Civil Rights Act Title 42 U.S.C. 1983, Title 28 U.S.C. 1343,

and pendent jurisdiction.

2. Plaintiffs JAMES BARBER, 802 North 40th Street, Philadelphia, PA 19104; FRED BRANDON, 1009 North 46th Street, Philadelphia, PA 19131; ALFONZO CAREY, 1020 North 46th Street, Philadelphia, PA 19131; BEATRICE DUNSTON, 4633 4061 Filbert Street, Philadelphia, PA. 19104; TIJUANA KNOX, 4061 Filbert Street, Philadelphia, PA 19104; WILLIAM S. MARTIN, 4002 Reno Street, Philadelphia, PA. 19104; MICHAEL C. McCLEARY, 4321 Haverford Avenue, Philadelphia, PA 19104. CHARLES E. MYERS, 667 Holly Mall, Philadelphia, PA. 19104; HARRY L. ROBINSON, JR., 764 N. 43rd Street, Philadelphia, PA 19104; DONITA B. ULMER, 835 North Brooklyn Street, Philadelphia, PA. 19104; ESSIE M. WILLIAMS, 616 North Brooklyn Street, Philadelphia, PA. 19104; ELSIE L. WISE, 4061 Filbert Street, Philadelphia, PA 19104; MEE JIN YOUK, 4248 Lancaster Avenue, Philadelphia, PA 19104, hereafter "Plaintiff

Committeepersons", are individuals who presently reside at the addresses listed above.

3. At all times hereinafter mentioned, the Defendant Michael Horsey, hereafter "Defendant Horsey", is the individual serving as the ward leader of the Democratic Executive Committee for the 6th Ward of the City of Philadelphia, hereafter the "Sixth Ward Democratic Committee", and who is believed to reside at 612 Cristina Place, Philadelphia, Pennsylvania 19139.

4. Defendant Philadelphia Democratic County Executive Committee, hereafter "Defendant Philadelphia City Committee", is an unincorporated political association comprised of the Democratic Ward Leaders chosen in each of the respective words of the City of Philadelphia whose principal place of business is 1421 Walnut Street, Philadelphia, Pa. 19102.

5. Defendant Robert Brady is an

individual whose principal place of business is 1421 Walnut Street, Philadelphia, PA 19102 and who currently serves as the chairman and chief officer and representative of the Defendant Philadelphia City Committee.

COUNT 1 ALL PLAINTIFFS v. DEFENDANT HORSEY ONLY VIOLATION OF 42 U.S.C. 1983-DAMAGES

6. At the primary election held on May 15, 1990, plaintiffs were all individuals elected to the position of Democratic Ward Executive Committee, hereafter "ward committeeperson", in the 6th Ward in the City of Philadelphia for the respective divisions shown in the above caption.

7. The Pennsylvania State Election Code, 25 P.S.§ 2837 adopts by reference the official rules of the Philadelphia Democratic County Executive Committee, hereafter "Democratic Party Rules", regarding the election of ward committeepersons and county committeepersons.

8. Rule III, Art. 1, Section B and Rule I Art. 1 of the Democratic Party Rules require that two persons are elected ward committeeperson for each respective voting division by the vote of a plurality of the Democratic voters at the primary election which was held on May 15, 1990.

9. The Democratic Party Rules, Rule III, Art. 1, Sec. A and Rule IV, Art. 1, Sec. A, also require that on the third Monday immediately following the election of the ward committeepersons, the elected ward committeepersons shall meet in each ward and elect a county committee member, hereafter referred to as "Democratic ward leader".

10. The Democratic Party Rules, Rule III, Art. 2, Sec. B-C and Rule V, Art. 1, Sec. F, and Rule V, Art. 2, Sec. E and Rule XI, Art. 1, mandate that the Democratic ward leader be elected by a plurality of the elected committeepersons in each ward who are actually present at the ward reorganization

meeting.

11. On or about June 4, 1990, the ward reorganization meeting for the Philadelphia 6th Ward Democratic Executive Committee was held at 8 P.M. at the Lincoln University Urban Campus at 4601 Market Street, Philadelphia.

12. At all times pertinent to this complaint, the Defendant Horsey claimed authority from the Pennsylvania Election Code and Democratic Party Rules to conduct elections for ward officers, and in doing the acts and things hereinafter set forth, said Defendant Horsey was acting in his capacity as a ward leader under color of state law.

13. At the 6th Ward Reorganization meeting, Defendant Horsey conducted the meeting in an improper fashion contrary to Democratic party rules and therefore, in violation of the Pennsylvania Election Code. In particular, Defendant Horsey refused to permit the elected plaintiffs and a plurality

of the elected committeepersons present to vote for ward officers.

14. Defendant Horsey proclaimed himself 6th Ward Democratic Ward Leader without a vote of the elected committeepersons present at the ward reorganization meeting. Defendant Horsey then appointed the other ward officers by "Royal Fiat" without an election in violation of Democratic Party rules and state law.

15. Plaintiffs were denied their voting rights to express their Free Speech political preference for ward officers guaranteed by the First Amendment to the U.S. Constitution. Plaintiffs and the voters they represent were totally denied the right to vote for a 6th ward leader and for other 6th ward officers of plaintiffs' choice on an equal basis with other elected committeepersons, in violation of Due Process and Equal Protection of the law as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

16. The voters represented by the plaintiff committeepersons were denied "One Person, One Vote" rights by the actions of Defendant Horsey,in violation of Equal Protection of the Law guaranteed by the Fourteenth Amendment to the U.S. Constitution.

17. If a fair and legal ward reorganization election had been conducted and the plaintiffs' votes been counted on June 4, 1990, Defendant Horsey would not have been chosen 6th Ward Democratic Ward leader nor would the other purported 6th Democratic ward officers have been chosen. Instead candidates whom the plaintiff committeepersons supported would have been elected instead. In particular, Plaintiff James Barber would have been elected Democratic Ward Leader of the 6th Ward.

18. The 6th Ward Democratic ward leader also acts under color of state law in that the ward leader serves as Democratic County

Committeeperson and in those roles as ward leader and county committeeperson has numerous official state functions including, inter alia, voting on the filling of vacancies for nomination for public office between primary and general elections, the adoption of Democratic Party Rules under the Election Code and the official endorsement of candidates for public office by the Democratic Party.

19. The Defendant Horsey has refused to recognize the plaintiffs as validly elected representatives of the Democratic voters of their respective divisions and has refused to give them notice of all ward meetings, refused to permit plaintiffs to vote or to participate at official Democratic ward meetings and functions of the 6th ward.

20. The actions of Defendant Horsey has caused and continues to cause the destruction of the Equal Rights of Free Speech and Free Assembly and One Person One Vote possessed by

the plaintiffs as guaranteed by the First and Fourteenth Amendments of the United States Constitution and applicable provisions of the Pennsylvania Constitution in that the acts of Defendant Horsey impeded and violated the Plaintiffs' ability to nominate and to vote for persons of their choice for public and political offices.

21. All plaintiffs were damaged in that they were deprived of their rights to elect a candidate of their choice as a ward leader and other ward officers.

22. Plaintiff James Barber and other plaintiffs were damaged in that they were deprived of their rights to be elected to the position of ward leader and other ward offices.

23. Plaintiffs are each entitled to damages in the amount of ten thousand dollars ($10,000.00) for their embarrassment, mental distress and the humiliation and violation of their First and Fourteenth Amendment Rights.

24. Plaintiff Barber is individually entitled to twenty thousand dollars ($20,000.00) damages for violation of his First and Fourteenth Amendment Rights to run for election for ward leader on an equal basis with all other candidates.

WHEREFORE, Plaintiffs request that the court find Defendant Horsey liable to Plaintiffs and to issue an order directing that Defendant Horsey pay to Plaintiffs an amount equal to compensatory and punitive damages, plus interest, attorney's fees and costs of the present action, plus such other relief as the court deems appropriate.

COUNT 2 - ALL PLAINTIFFS v. ALL DEFENDANTS
INJUNCTIVE RELIEF

25. Paragraphs 1 through 24 are incorporated herein by reference.

26. Plaintiffs filed an appeal of Defendant Horsey's claim to ward leadership with the Defendant Philadelphia City

Committee. Defendant Philadelphia City Committee held a hearing to certify the new 6th ward leader. In convening the hearing under party rules incorporated into state law, Defendant Philadelphia City Committee was acting under color of state law.

27. Based on evidence which Defendant Horsey knew to be false and fraudulent, Defendant Brady and Philadelphia City Committee were misled and accepted Defendant Horsey's claim to the position of 6th Ward Democratic Ward Leader.

28. In particular, Defendant Horsey knowingly misrepresented that certain individuals voted for him at the 6th ward reorganization meeting, when in fact the individuals either did not vote for Defendant Horsey or were not in fact present at the reorganization meeting. Party Rules require that only the votes of persons present at the reorganization meeting may be counted.

29. Defendant Philadelphia City

Committee has given Defendant Horsey notice of all City Committee meetings and Defendant City Committee recognizes Defendant Horsey as 6th Ward Democratic Ward Leader for all purposes to the exclusion of the rights, vote and actual choice of the 6th Ward Democratic Committeepersons.

30. The failure of Defendant Philadelphia City Committee to recognize the actual choice of the 6th ward committeepersons is a violation of the party rules incorporated in state law, 25 P.S. 2837, and constitutes a denial of Due Process and Equal Protection of the law. Defendant Horsey's status as Sixth Ward Leader is illegal and obtained by egregious fraud. Defendant Brady and Philadelphia City Committee should be enjoined from recognizing Defendant Horsey as ward leader or from providing him with voting rights or other rights and privileges as 6th Ward Democratic Ward Leader.

31. Plaintiffs are irreparably harmed in that their choice of 6th Ward Leader and other ward officers, which Plaintiffs elected after Defendant Horsey illegally adjourned the reorganization meeting, have not been recognized by the Defendant Democratic City Committee for the current term. The ability to exercise rights and privileges of ward offices exists only until the expiration of the current term of the ward offices.

32. Plaintiffs have no adequate remedy at law to reinstate the majority choice for ward officers of the 6th ward other than an injunction.

WHEREFORE, Plaintiffs request that the court issue an order: 1. enjoining Defendant Brady and Philadelphia Democratic City Committee, its officers and agents from counting the vote of Defendant Horsey as a county committeeperson on any matter on which the 6th Ward leader would cast a vote under Democratic Party Rules or otherwise under

state law, and from otherwise recognizing, Defendant Michael Horsey as 6th Ward Democratic Ward Leader, and from listing Defendant Michael Horsey on any official communication of the Democratic Party as 6th Ward Leader or County Committeeperson; 2. that James Barber be recognized for all purposes as the validly elected Sixth Ward Democratic Executive Committee County Committeeperson, i.e. 6th Ward Leader, and that Defendant Philadelphia City Committee, its officers, employees and agents grant all rights and privileges of such office for all purposes to James Barber on the same and equal basis as every other elected county committeeperson in Philadelphia; 3. That Defendant Horsey be enjoined from conducting any official meetings of the 6th Ward Democratic Executive Committee; 4. directing that all Plaintiffs be given notice of all official Sixth Ward Meetings and that the votes of Plaintiffs be counted according to

state election law and Democratic Party rules until the current term of Committeeperson expires; 5. grant such other relief as the court deems appropriate.

COUNT 3
ALL PLAINTIFFS v.
DEFENDANT HORSEY ONLY
ATTORNEY FEES AND COSTS

33. The actions of Defendant Horsey described in Count 1 and 2 above make him liable for attorney's fees and costs under the Attorney's Fees Civil Rights Act, 42 U.S.C. 1986.

WHEREFORE, Plaintiffs request that the court find Defendant Horsey liable to Plaintiffs and to issue an order directing that Defendant Horsey pay to Plaintiffs an amount equal to compensatory and punitive damages, plus interest, attorney's fees and costs of the present action, plus such other relief as the court deems appropriate.

COUNT 4
PLAINTIFFS v. DEFENDANT HORSEY ONLY
COMMON LAW FRAUD
PENDENT JURISDICTION

34. Paragraph 1 through 33 are incorporated herein by reference.

35. Defendant Horsey misrepresented: a) the number of persons present and voting at the June 4, 1990 ward reorganization meeting and whom they voted for, and b) that the meeting was conducted in accordance with Democratic Party rules and state law.

36. Defendant Horsey's misrepresentations were material and deliberate and intended to induce the reliance of Democratic City Committee.

37. Democratic City Committee reasonably relied on the misrepresentations of Defendant Horsey in its certification of Defendant Horsey as Democratic 6th Ward leader.

38. The Plaintiffs in turn relied on the actions of Democratic City Committee in Democratic City Committee's review of its

certification of Defendant Horsey as 6th Ward leader.

39. Plaintiffs were damaged by Defendant Horsey's fraud in that Plaintiffs lost their choice of 6th ward leader and ward officers.

WHEREFORE, Plaintiffs request that the court find Defendant Horsey liable to Plaintiffs and to issue an order directing that Defendant Horsey pay to Plaintiffs an amount equal to compensatory and punitive damages, plus interest, attorney's fees and costs of the present action, plus such other relief as the court deems appropriate.

COUNT 5
PLAINTIFFS v. DEFENDANT HORSEY
VIOLATION OF STATE STATUTE
PENDENT JURISDICTION

40. Counts 1,2 and 4 are incorporated herein by reference.

41. The Philadelphia Democratic Party Rules regarding the election of committeeperson and ward leaders are

incorporated into the state election code, 25 P.S. 2837.

42. The action of Defendant Horsey violate the Democratic Party Rules and therefore the Pennsylvanian State Election Code. WHEREFORE, Plaintiffs request that the court find Defendant Horsey liable to Plaintiffs and to issue an order directing that Defendant Horsey pay to Plaintiffs an amount equal to compensatory and punitive damages, plus interest, attorney's fees and costs of the present action, plus such other relief as the court deems appropriate.

COUNT 6
PLAINTIFFS v. DEFENDANT HORSEY
VIOLATION OF
PENNSYLVANIA CONSTITUTION
DENIAL OF EQUAL PROTECTION
PENDENT JURISDICTION

43. Paragraph 1 through 42 are incorporated herein by reference.

44. The actions of Defendant Horsey in failing to conduct a proper election for ward

leader, constitute a violation of Plaintiffs, Free Speech and Equal Protection Rights as guaranteed by Article 1, Sections 1,2,5,7 and 26 of the Pennsylvania State Constitution.

WHEREFORE, Plaintiffs request that the court find Defendant Horsey liable to Plaintiffs and to issue an order directing that Defendant Horsey pay to Plaintiffs an amount equal to compensatory and punitive damages, plus interest, attorney's fees and costs of the present action, plus such other relief as the court deems appropriate.

COUNT 7 - PUNITIVE DAMAGES
ALL PLAINTIFFS v.
DEFENDANT HORSEY ONLY

45. Paragraph 1 through 44 are incorporated herein by reference.

46. The actions of Defendant Horsey were intentional, malicious and in bad faith or recklessly indifferent to the rights of Plaintiffs, entitling Plaintiffs to punitive damages in the amount of fifty thousand

dollars ($50,000.00).

WHEREFORE, Plaintiffs request that the court find Defendant Horsey liable to Plaintiffs and to issue an order directing that Defendant Horsey pay to Plaintiffs an amount equal to compensatory and punitive damages, plus interest, attorney's fees and costs of the present action, plus such other relief as the court deems appropriate.

ROBERT J. MULLIGAN[s]
Robert J. Mulligan Esq.
Attorney for Plaintiffs Barber et al.
4800 Larchwood Ave.
Philadelphia, Pa. 19143-2027
Atty. ID # 18470
(215) 474-0744
S.A.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBER, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
HORSEY, et al.	:	No. 91-CV-4265

MOTION TO DISMISS OF DEFENDANTS DEMOCRATIC COUNTY EXECUTIVE COMMITTEE OF PHILADELPHIA AND MICHAEL HORSEY

Comes Now Defendants Michael Horsey and Democratic County Executive Committee of Philadelphia (hereinafter "Moving Defendants"), by and through its attorneys, Stephen J. Springer, Esquire, and Isadore A. Shrager, Esquire, and moves this Honorable Court pursuant to Rule 12(b)(1) and (6) to dismiss Plaintiffs' Complaint for the reasons set forth in Moving Defendants' accompanying Memorandum of Law.

STEPHEN J. SPRINGER[s]
STEPHEN J. SPRINGER, ESQUIRE
LaBRUM AND DOAK
1700 Market Street - Suite - 700
Philadelphia, PA 19103

Atty. I.D. #13627
(215) 587-4311

ISADORE A. SHRAGER[s]
ISADORE A. SHRAGER, ESQUIRE
FOX, ROTHSCHILD, O' BRIEN &
FRANKEL
2400 Market Street - 10th Floor
Philadelphia, PA 19103
Atty. I.D. #03276
(215) 299-2022
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
MICHAEL HORSEY, et al.	:	NO. 91-4265

CERTIFICATE OF SERVICE

I do hereby certify that service of a true and correct copy of the within Defendants' Motion to Dismiss and supporting Memorandum of Law was made on August 9, 1991, to counsel named below by first class United States Mail, postage prepaid, to the following:

Robert J. Mulligan, Esquire
4800 Larchwood Avenue
Philadelphia, PA 19143-2027

LaBRUM AND DOAK

By: Stephen J. Springer[s]
Stephen J. Springer

DATE: August 8, 1991

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBER et. al.	:	CIVIL ACTION
	:	
	:	
HORSEY, et. al.	:	No. 91-CV-4265

STIPULATION

It is hereby Stipulated by and between Robert J. Mulligan, Esquire, counsel for Plaintiffs, and Stephen J. Springer, Esquire, co-counsel for Defendants, that the time for Defendants to move, respond or otherwise plead to Plaintiff's Complaint is extended until August 12, 1991 No prior requests for an extension has been made.

ROBERT J. MULLIGAN[s]
ROBERT J. MULLIGAN, ESQUIRE
4800 Larchwood Avenue
Philadelphia, PA. 19143-2027
Atty. ID. #18470
(215) 474-0744
Attorney for Plaintiffs

STEPHEN J. SPRINGER[s]
STEPHEN J. SPRINGER, ESQUIRE
LaBRUM AND DOAK
1700 Market Street - Suite 700
Philadelphia, PA 19103
Atty. I.D. #13627
Attorney for Plaintiffs
(215) 587-4311

ISADORE A. SHRAGER, ESQUIRE
FOX, ROTHSCHILD, O'BRIEN &
FRANKEL
2000 Market Street - 10th Floor
Philadelphia, PA 19103
Atty. I.D. #03276
(215) 299-2022
Attorneys for Defendants

EXTENSION GRANTED AS STIPULATED
MICHAEL E. KUNZ
CLERK
By:
Deputy Clerk
Date: 8-13-91

ENTERED: 8-14-91
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBER, et al.	:	CIVIL ACTION
v.	:	
HORSEY, et al.	:	NO. 91-CV-4265

ANSWER TO MOTION TO DISMISS

Plaintiffs James Barber et al. request that the court deny defendants motion to dismiss plaintiff's complaint under FRCP 12(b)(1) and (6) for the reasons set forth in plaintiff's accompanying memorandum.

ROBERT J. MULLIGAN JR
Robert J. Mulligan
Attorney for Plaintiffs
James Barber et al.
Attorney I.D. No.18470
4800 Larchwood Avenue
Philadelphia, PA 19143
(215)474-0744

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER ET AL.	:	
Plaintiff	:	
v.	:	No.91-CV-4265
MICHAEL HORSEY ET AL.	:	
Defendants	:	

CERTIFICATION OF SERVICE

I, ROBERT J. MULLIGAN ESQ., hereby certify that I have served copies of the PLAINTIFFS' ANSWER TO MOTION TO DISMISS WITH MEMORANDUM upon the defendants counsel in the above captioned matter, by mailing a copy by first class mail on DATE August 21, 1991, addressed to:

Stephen J. Springer Esq.
Labrum and Doak
1700 Market Street-Suite 700
Philadelphia, PA 19103
Attorney for Defendants

8/21/91
Date

Robert J. Mulligan
(215) 474-0744
Attorney I.D. #18470
Robert J. Mulligan, Esq.
4800 Larchwood Avenue
Philadelphia, PA 19143-2027
Attorney for Plaintiffs
James Barber et al.

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER, et at.	:	Civil Action
	:	
v.	:	
	:	
MICHAEL HORSEY, et at.	:	No. 91-4265

Newcomer, J. November 27, 1991

M E M O R A N D U M

Plaintiffs bring this civil rights action claiming that defendants, in violation of 42 U.S.C. § 1983, violated plaintiffs' constitutional rights while acting under color of state law. Presently before the court is defendants' motion to dismiss pursuant to Fed. R. Civ. P, 12(b) (6).

I. Factual Background.

Defendant Horsey is the Ward Leader of the Democratic Party Executive Committee for the Sixth Ward in the City of Philadelphia. Defendant Philadelphia Democratic County Executive Committee ("City Committee") is an unincorporated political association.

The City Committee is comprised of Democratic Ward Leaders representing the various wards of Philadelphia.

On May 15, 1990, a Democratic primary election was held. Plaintiffs were elected as Ward Committeepersons for the Sixth Ward in Philadelphia. On June 4, 1990, a meeting of the Sixth Ward Executive Committee was held. At this meeting, defendants Horsey conducted an election for ward officers. According to plaintiffs' Complaint, defendant Horsey, in violation of Democratic party rules and the Pennsylvania Election Code, refused to permit many of the committeepersons, including the plaintiffs, to vote for ward officers. The Complaint alleges that defendant Horsey declared himself Ward Leader of the Sixth Ward and appointed ward officers without an election.

Plaintiffs filed an appeal with defendant City Committee, which after a hearing, accepted defendant Horsey as Ward

Leader of the Sixth Ward. Plaintiffs allege that the City Committee's recognition of defendant Horsey as Ward leader was in violation of the rules of the City Committee and Pennsylvania State law.

II. Rule 12(b)(6) Standard.

Pursuant to Fed. R. Civ. P. 12(b)(6), a court should dismiss a case for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Because granting such a motion results in a determination on the merits at such an early stage of a plaintiff's case, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Derby Township, 838 F.2d

663, 664-65 (3d Cir. 1988) (quoting Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3d Cir. 1985)).

III. Discussion

In order for plaintiffs' claim to survive the motion to dismiss this court must find that plaintiffs may be entitled to relief under the United States Constitution and/or 42 U.S.C. § 1983, otherwise this court will have no jurisdiction to decide plaintiffs' case. 28 U.S.C. § 1331. The primary determinative issue in this case is whether defendants were acting as state actors under color of state law when they committed the acts forming the basis of plaintiffs' Complaint.

Plaintiffs assert that Bentman v. Seventh Ward Democratic Executive Committee 421 Pa. 188, 218 A.2d 261 (1966), is dispositive of this issue. In Bentman, the Pennsylvania Supreme Court held that the internal affairs of a political party are of

such concern to the public as to subject these affairs to the restraints placed on state actors by the United States Constitution. Id. Plaintiffs claim that under the doctrine developed in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), which holds that state court interpretations of state law are binding on federal courts sitting in diversity, this court is bound by the Pennsylvania Supreme Court's opinion in Bentman.

Plaintiffs' argument is flawed in one major regard. This court is not sitting in diversity adjudicating a state law claim. Plaintiffs' claim is before this court under this court's federal question jurisdiction. See 28 U.S.C. § 1331. In matters of federal law, only precedent established by the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States is controlling.

In Lynch v. Torquato, [1] the Third Circuit held that "the normal role of party leaders in conducting internal affairs of their party... does not make their party offices governmental offices or the filling of these offices state action." Ten years later, in McMenamin v. Philadelphia County Democratic Executive Committee,[2] then District Court Judge Higginbotham, applied the Third Circuit's reasoning in Lynch to a case which was nearly identical to the instant case. In McMenamin, the plaintiff instituted a civil rights action against the defendants alleging that defendants unconstitutionally deprived her of the position of Ward Leader of the forty-second ward of Philadelphia. Defendants were accused of denying plaintiff and others the right to vote for Ward Leader and of

---

[1]/ 343 F.2d 370 (3d Cir. 1965).

[2] 405 F. Supp. 998 (E.D. Pa 1975).

improperly recognizing the incumbent Ward Leader. Citing Lynch, Judge Higginbotham concluded that the internal affairs of a political party, specifically the filling of a party office, is not state action, nor does it constitute action under color of state law. McMenamin, 405 F. Supp. at 1003-04. See also Banchy v. Republican Party of Hamilton County, 898 F.2d 1192, 1196 (6th Cir. 1990), citing Lynch and McMenamin.

This court adopts the reasoning of the McMenamin decisions and concludes that the alleged actions of defendants in the instant case (which are virtually identical to the actions of the defendants in McMenamin) do not constitute state action. Accordingly, as plaintiffs have alleged no federal claim upon which relief can be granted, plaintiffs' action will be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

IV. Conclusion.

This court in no way intends to sanction the type of abuse of political party rules and policies that plaintiffs here allege. Conduct of the sort alleged is an outrage, and plaintiffs' desire for redress is understandable. Plaintiffs, however, have chosen the wrong cause of action in the wrong forum to seek redress. Under the federal law as it currently stands, defendants' alleged wrongdoing does not constitute a breach of any federal statutory or constitutional right of plaintiffs.

An appropriate Order follows.

Clarence C. Newcomer [s]

Clarence C. Newcomer,

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER, et al.	:	Civil Action
v.	:	
MICHAEL HORSEY, et al.	:	No. 91-4265

O R D E R

AND NOW this 27th day of November, 1991, after consideration of defendants' Motion to Dismiss, and plaintiffs' response thereto, consistent with the foregoing memorandum opinion, it is hereby ORDERED that defendants motion is GRANTED and plaintiffs' action is DISMISSED with prejudice.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER et al.	:	
Plaintiffs	:	Civil Action
	:	
v.	:	No.91-cv-4265
	:	
MICHAEL HORSEY et al.	:	(Newcomer)
Defendants	:	

NOTICE OF APPEAL

BY PLAINTIFFS JAMES BARBER, FRED BRANDON, ALFONZO CAREY, BEATRICE DUNSTON, TIJUANA KNOX, WILLIAM S. MARTIN, MICHAEL C. MCCLEARY, CHARLES E MYERS, HARRY L ROBINSON, JR., DONITA B.ULMER, ESSIE M. WILLIAMS, ELSIE L. WISE, MEE JIN YOUK

DATE: DECEMBER 27, 1991

Notice is hereby given that Plaintiffs James Barber, Fred Brandon, Alfonzo Carey, Beatrice Dunston, Tijuana Knox, William S. Martin, Michael C. MCCleary, Charles E. Myers, Harry L. Robinson, JR., Donita B. Ulmer, Essie M. Williams, Elsie L. Wise, Mee Jin Youk hereby appeal to the United States Court of Appeals for the Third Circuit from the final order of U.S. District Judge Clarence Newcomer of the U.S. District Court for the Eastern District of Pennsylvania entered in this action on December 4, 1991 dismissing plaintiffs' action.

December 27, 1991
Date

ROBERT J. MULLIGAN [s]
Attorney I.D. #18470
Robert J. Mulligan, Esq.
4800 Larchwood Avenue

Philadelphia, PA 19143-2027
Attorney for Appellants/Plaintiffs
James Barber et al.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER et al. Plaintiffs	:	Civil Action
v.	:	No.91-cv-4265
MICHAEL HORSEY et al. Defendants	:	(Newcomer)

CERTIFICATION OF SERVICE

I, ROBERT J. MULLIGAN ESQ., hereby certify that I have served copies of the Plaintiffs NOTICE OF APPEAL upon the defendants counsel in the above captioned matter, by mailing a copy by first class mail on DECEMBER 27, 1991, addressed to:

Stephen J. Springer Esq.
Labrum and Doak
1700 Market Street-Suite 700
Philadelphia, PA 19103

Isadore A. Shrager Esq.
O'Brien & Frankel
2000 Market Street 10th Floor
Philadelphia, PA 19103
Cocounsel for Defendants
Michael Horsey et al.

ROBERT J. MULLIGAN
Date 12/27/92
Attorney I.D. #18470
Robert J. Mulligan, Esq.
4800 Larchwood Avenue
Philadelphia, PA 19143-2027
Attorney for Appellants/Plaintiffs
James Barber et al.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-2104

JAMES Barber (9th Div.), FRED BRANDON (18th Div.), ALFONZO CAREY (18th Div .), BEATRICE DUNSTON (16th Div.), TIJUANA KNOX (1st Div.), WILLIAM S. MARTIN (9th Div.), MICHAEL C. McLEARY (5th Div.), CHARLES E. MYERS (7th Div.), HARRY L. ROBINSON, JR. (8th Div.), DONITA B. ULMER (10th Div.), ESSIE M. WILLIAMS (5th Div.), ELSIE L. WISE (1st Div.), MEE JIN YOUK (8th Div.),
Appellants

V.

MICHAEL HORSEY, ROBERT BRADY, on behalf of PHILADELPHIA DEMOCRATIC COUNTY EXECUTIVE COMMITTEE, An Unincorporated Association,
Appellees

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-04265)

District Judge:
Honorable Clarence C. Newcomer

Submitted Under Third Circuit Rule 12(6)
June 23, 1992

PRESENT: HUTCHINSON, COWEN and ALITO,
Circuit Judges

JUDGEMENT

This cause came to be heard on record from the United States district Court for the Eastern District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on June 23, 1992.

On consideration whereof, it is now here ordered and adjudged by this court that the order to the district court entered December 3, 1991, be and the same is hereby affirmed.

Costs shall be taxed against appellants.

ATTEST:

Sally Mrvos [s]
Clerk

DATED: July 17, 1992

[stamped]
Certified as a true copy and issued in lieu of a formal mandate on September 8, 1992

Test: Signature [s]

Acting Chief Deputy Clerk, United states Court of Appeals for the Third Circuit

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-2104

JAMES Barber (9th Div.), FRED BRANDON (18th Div.), ALFONZO CAREY (18th Div .), BEATRICE DUNSTON (16th Div.), TIJUANA KNOX (1st Div.), WILLIAM S. MARTIN (9th Div.), MICHAEL C. McLEARY (5th Div.), CHARLES E. MYERS (7th DiV.), HARRY L. ROBINSON, JR. (8th Div.), DONITA B. ULMER (10th Div.), ESSIE M. WILLIAMS (5th Div.), ELSIE L. WISE (1st Div. , MEE JIN YOUK (8th Div.),
Appellants

V.

MICHAEL HORSEY, ROBERT BRADY, on behalf of PHILADELPHIA DEMOCRATIC COUNTY EXECUTIVE COMMITTEE, An Unincorporated Association,
Appellees

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-04265)

District Judge:
Honorable Clarence C. Newcomer

Submitted Under Third Circuit Rule 12(6)
June 23, 1992
Filed: July 17, 1992

PRESENT: HUTCHINSON, COWEN and ALITO,

Circuit Judges

MEMORANDUM OPINION OF THE COURT

HUTCHINSON, Circuit Judge

James Barber (Barber) and the other appellants [1] are committee persons of the Democratic Party for the Sixth Ward of the City of Philadelphia. They appeal an order of the United States District Court for the Eastern District of Pennsylvania dismissing their complaint for a failure to state a claim pursuant to Federal Rule of Civil Procedure 12 (b) (6).

Barber alleges that Michael Horsey (Horsey) and Robert Brady, on behalf of the Philadelphia Democratic County Executive Committee (collectively "Democratic City Committee"), acted under color of state law

---

[1]/ The other appellants are Fred Brandon, Alfonzo Carey Beatrice Dungeon, Tijuana Knox, William S. Martin, Michael C. McCleary, Charles E. Myers, Harry L. Robinson, Jr., Donita h. Ulmer, Elsie M. William, Elsie L. Wis and Mee Jin Youk.

in denying Barber and the other appellants the right to vote to replace Horsey as Democratic Ward Leader for the Sixth Ward in the City of Philadelphia. In their complaints Barber and the other appellants assert that Horsey refused to count their votes for ward leader at a ward reorganization meeting called in accord with party rules, even though Barber -and his allies had been elected Democratic committee persons in the preceding primary. They allege that Horsey's course of conduct was an action taken under color of state law because the Pennsylvania Election Code, 25 Pa. Cons. Stat. Ann. § 2837 (1963) incorporates the rules of the major political parties into state law. Therefore, Barber claims that Horsey's refusal to permit Barber and the committee persons allied with him an opportunity to vote, along with the Democratic City Committee's rejection of Barbers protest against Horsey's election as

ward leader, violated 42 U.S.C.A. § 1983 (West 1981).

The district court had subject matter jurisdiction over Barber's claims pursuant to 28 U.S.C.A. §§ 1331 (West Supp. 1992) and 1343(a) (West Supp. 1992). We have appellate jurisdiction over Barber's appeal pursuant to 28 U.S.C.A. § 1291 (West Supp. 1992).

The facts, as stated by the district court in its opinion granting Horsey's Rule 12(b)(6) motion to dismiss, are as follows: Horsey is the Ward Leader of the Democratic City Committee for the Sixth Ward in Philadelphia. The Democratic City Committee is an unincorporated political association and is comprised of Democratic Ward Leaders representing the various wards of Philadelphia.

On May 15, 1990, a Democratic primary election was held. Barber and the other appellants were elected as ward committee persons for the Sixth Ward of Philadelphia.

On June 4, 1990, a meeting of the Sixth Ward Executive Committee was held where Horsey conducted an election for ward officers. According to Barber's complaint, Horsey, in violation of Democratic party rules and the Pennsylvania Election Code, refused to permit many of the committee persons, including Barber and the other appellants, to vote for ward officers. The complaint alleges that Horsey declared himself Ward Leader of the Sixth Ward and appointed ward officers without an election.

Barber filed an appeal with the Democratic City Committee which, after a hearing, accepted Horsey as Ward Leader of the Sixth Ward. Barber alleges that the Democratic City Committee's recognition of Horsey as Ward Leader was in violation of the rules of the Democratic City Committee and Pennsylvania state law.

The decision of this Court in Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1968) holding

that "the normal role of party leaders in conducting internal affairs of their party... does not make their party offices governmental offices or the filling or these offices state action," id. at 372, controls this case. It is, of course, binding on this panel under Third Circuit Internal operating Procedure 91. See also McMenamin v. Philadelphia County Democratic Executive Committee, 405 F. Supp. 998, 1003-04 (E.D. Pa. 197) (Higginbotham, J,) (denying relief to plaintiff McMenamin in a civil rights action alleging party leaders deprived her of the position of ward leader in the 42nd Ward of Philadelphia because filling of a party office is not state action and does not constitute action under color of state law). While we did exempt "primary and general elections" from our holding in Lynch, that reference was to those elections in which the general populace votes and not to elections which decide the internal organization of a

political party, like the one in this case.

Barber asks us to follow the Supreme Court of Pennsylvania's decision in Bentman v. Seventh Ward Democratic Exec. Comm., 218 A.2d 261 (Pa. 1965). In Bentman, the court held a party committee's refusal to recognize membership on party committees "to persons who have been lawfully elected to such membership by a majority of the qualified party electors" qualifies as a state action under the Fourteenth Amendment to the United States Constitution. See id. at 269. This conflicts with our holding in Lynch.

It is unfortunate that there is a conflict between the decisions of the highest court of the Commonwealth of Pennsylvania and the decisions of this Court concerning federal civil rights law. Nevertheless, this panel is controlled by the decisions of this Court concerning federal law and not by differing interpretations advanced by state courts. Now Circuit Judge Higginbotham said

in McMenamin:

> If I were bound to anticipate how the Pennsylvania Supreme Court would construe this issue as a matter of federal constitutional law, I would be inclined to hold that under the rationale suggested in Bentman, plaintiff's complaint should not be dismissed. However, I am bound by the ruling of the Court of Appeals of this Circuit and, because of Lynch, I cannot justify this court's intervention in the election of a ward leader when trial judges have been advised that a federal court should not even intervene in the election of a party's county chairman.

McMenamin, 405 F. SUPP. at 1003. Erie is not applicable to the interpretation of federal law.

Like the district court, we do not mean to condone or approve the conduct of party affairs in the manner in which Barber alleges they were conducted in this case. We are, however, unable to grant relief under controlling case law. As the district court stated, appellants have chosen the wrong forum to seek redress for the failure of Horsey and the Democratic City Committee to

afford them the right, as duly elected committee persons, to vote for the ward leader of their choice. The proper forum for the appellants is the Pennsylvania state courts.

TO THE CLERK:
Please file the foregoing memorandum opinion.

William D. Hutchinson [s]
Circuit Judge

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JAMES BARBER, et al. Petitioners, Appellants	: CIVIL APPEAL
v.	: Appeal Docket : No. 91-2104
MICHAEL HORSEY, et al. (Hutchinson) Appellees	:

APPELLANTS' MOTION TO EXTEND TIME TO FILE EN BANC REHEARING REQUEST UNDER F.R.A.P. 40(a), 27(b) and (c), and 26(b)

1. Petitioners are JAMES BARBER ET AL., appellants in the above captioned appeal.

2. Respondents are Michael Horsey et al, appellees in the above captioned appeal.

3. On June 23, 1992, the above matter was referred to a three judge appeal panel on the briefs alone pursuant to Third Circuit Local Rule 12(6).

4. The decision was filed by the panel on Friday, July 17, 1992 denying the appeal.

5. The memorandum opinion was received by the office of Robert J. Mulligan Esq., attorney for appellants on Tuesday, July 21, 1992.

6. Attorney Robert J. Mulligan was outside of the United States on vacation for the period commencing July 18, 1992 until August 3, 1992.

RECEIVED AND FILED
8-3-92
SALLY MRVOS
[s]
Clerk

ORDER
Motion GRANTED
Sally Mrvos

CLERK
AUG 4, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-2104

JAMES BARBER (9th Div.), FRED BRANDON (18th Div.), ALFONZO CAREY (18th Div.), BEATRICE DUNSTON (16th Div.), TIJUANA KNOX (1st. Div.), WILLIAM S. MARTIN (9th Div.), MICHAEL C. McCLEARY (5th Div.), CHARLES E. MYERS (7th Div.), HARRY L. ROBINSON, JR. (8th Div.), DONITA B. ULMER (10th Div.), Essie M. William (5th Div.), ELSIE L. WISE (1st Div.), MEE JIN YOUK (8th Div.),
Appellants

v.

MICHAEL HORSEY, ROBERT BRADY on behalf of PHILADELPHIA DEMOCRATIC COUNTY EXECUTIVE COMMITTEE, An Unincorporated Association,
Appellees

Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-04265)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON,

SCIRICA, COWEN, NYGAARD,
ALITO, and ROTH, Circuit Judges

The petition for rehearing filed by appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the court,

William D. Hutchinson
Circuit Judge

DATED: AUG 31, 1992